87-1192 (1)

IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1987

JACQUE RONALD INSCOE,
Petitioner,

vs.

ACTON CORPORATION, ET AL., AND,
DIRECTOR, OFFICE OF WORKER'S
COMPENSATION PROGRAMS, U.S. DEPARTMENT
OF LABOR,
Respondents.

PETITION TO THE UNITED STATES SUPREME COURT FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Allan P. Feigelson
5304 Kenilworth Avenue
P.O. Box 361
Riverdale, Maryland 20737
(301) 864-2200
Attorney for Petitioner

50 pp

QUESTIONS PRESENTED

I. Whether Section 33(f) and (g) of the Longshoremen's and Harbor Workers' Compensation Act has priority over a valid and binding settlement order of the U.S. Department of Labor.

II. Whether a set-off right is waivable under the Longshoremen's and Harbor Workers' Compensation Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

STATUTES

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Appendix A, infra. p. 12) is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia (Appendix A, infra. p. 12) was entered on October 22, 1987. The jurisdiciton of the Supreme Court is invoked under 1254(1) which states:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATUTES

1. The applicable federal statute, Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. Sections 933(b), (f) and (g) provide:

33 USCS
Section 933. Compensation for injuries where third persons are liable

(b) Acceptance of compensation acting as assignment
Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner of Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

(f) Institution of proceedings by person entitled to compensation
If the person entitled to compensation institutes proceedings within the period prescribed in section 33(b) [subsec.(b) of this section] the employer shall be

required to pay as compensation under this Act, a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

(g) Compromise obtained by person entitled to compensation
If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this act, the employer shall be liable for compensation as determined in subdivision (g) only if the written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made.*

*This statute has been revised since the time of the proceedings below.

STATEMENT OF CASE

This petition is brought by Jacque Ronald Inscoe, who was injured on June 25, 1979, in work-related automobile accident. In May 1981, Petitioner settled his workers' compensation claim with the employer, Acton Corporation, for a lump sum of $100,000.00 and payment of all future medical treatment causally related to his accident. (Appendix B, infra. p. 15)

In January of 1980, Petitioner filed suit against the third party involved in the automobile accident. In July 1982, Petitioner settled the third-party claim for $100,000.00. The employer, who was permitted to intervene as a party-plaintiff, settled for $125,000.00. (Appendix C infra. p. 19)

Petitioner has and continues to incur additional medical expenses related to the accident. Pursuant to the settlement agreement of May 1981, Petitioner filed a claim for payment of these medical expenses.

The employer declined payment arguing that it is entitled to credit against Petitioner's third party settlement in the amount of Petitioner's net recovery pursuant to 33 U.S.C. section 933(f). (Appendix D, infra. p. 22)

Administrative Law Judge Nicodemo Degregorio agreed with the employer's position and Petitioner appealed. The Benefit Review Board affirmed the Administrative Law Judge's decision stating that the employer is entitled to offset the amount of Petitioner's net third party recovery and need not pay the

"future medicals" until those expenses exceed his net third party recovery. (Appendix E, infra. p. 25)

REASONS FOR GRANTING WRIT

This situation is a case of first impression. Petitioner seeks an interpretation of section 33(f) of the Longshoremen's and Harbor Workers' Compensation Act as applied to an order of the Department of Labor providing for future medical payments. Specifically, whether a signed agreement between the Petitioner and Respondent, pursuant to an Order of the Department of Labor is binding as stated or a right to offset a net recovery is implied through the Longshoremen's and Harbor Workers' Compensation Act.

Petitioner challenges the Respondent's right to offset Petitioner's

net recovery from the third party before paying any future medical expenses.

On appeal the Respondent relied on Section 33(f) which states:

> If the person entitled to compensation institutes proceedings within the period prescribed in Section 33(b), the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury of death over the amount recovered against such third person.

The above section as well as the cases cited by the Respondent in the proceedings below are factually distinguishable from the case at hand.

In the instant case, the Respondent signed a written agreement with the Petitioner. (Appendix F, infra. p. 41) This agreement was obviously meant to create a binding obligation between the

parties. Despite section 33(f), at the time of signing both parties intended the agreement to establish the Respondent's responsibility for any future medical expenses. This is supported by the fact that the parties knowingly and voluntarily entered into the settlement agreement which specifically provided for such. Thus, the Petitioner rightfully anticipated the Respondent to be bound by the terms of the agreement despite the settlement for $125,000.00. This settlement came after Respondent was obligated for future medicals; accordingly, Respondent could have settled with the third party for an amount respective of that obligation.

Respondent has been reimbursed most of the expenses paid as a result of Petitioner's injury. Yet, the purpose of the Longshoremen's and Harbor Workers'

Compensation Act is not to make the employer whole, but to compensate the employee. The Department of Labor ordered future medical expenses to be paid because it was forseeable that Petitioner would need future medical treatment and the purpose of the statute is to compensate the injured.

However, in all the attempts to avoid a double recovery the purpose of the statute has been forgotten. Now, Petitioner is bearing the loss for a job-related injury and the Respondent, compensated by the third-party settlement, has been permitted to offset any medical payments.

CONCLUSION

By allowing the Respondent to offset the payment of future medical expenses by Petitioner's net third-party recovery, Petitioner is being denied compensation contractually and statutorily due him.

Therefore, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Allan P. Feigelson
Counsel for Petitioner
5304 Kenilworth Avenue
P.O. Box 361
Riverdale, Maryland 20737

PROOF OF SERVICE

I HEREBY CERTIFY that on this_____ day of _____ 1988, I mailed three copies of the foregoing to Arthur King, Esq., Attorney for Employer, Acton Corporation and Lumbermen's Mutual Casualty Company, 22 West Jefferson St., Rockville, Md. 20850, and Director, Office of Worker's Compensation Programs, U.S. Department of Labor, 200 Constitution Ave., N.W., Washington, D.C. 20001.

_____
Allan P. Feigelson

APPENDIX
APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1641 September Term,1987

Jacque Ronald Inscoe,
Petitioner

v.

Acton Corporation, et al. and
Director, Office of Workers'
Compensation Programs,
U.S. Department of Labor,
Respondents

United States Court
of Appeals
for the District of
Columbia Circuit
Filed Oct 22 1987
George A. Fisher
Clerk

PETITION FOR REVIEW OF AN ORDER OF THE
BENEFITS REVIEW BOARD

Before: ROBINSON, RUTH B. GINSBURG, and
SILBERMAN, Circuit Judges.

JUDGMENT

This appeal from a Decision and Order of the Benefits Review Board was considered on the record from the Board and on the briefs and oral arguments of

counsel. The court, upon full review of the case, concludes that the issue presented occasions no need for a published opinion. See D.C. Cir. R.14 (c).

The Board denied petitioner Inscoe's claim on the ground that the employer had taken no action that constituted a waiver of its set-off right. We agree, and cite, as did the Board, the clear and convincing reasoning of our sister court in Petro-Weld, Inc. v. Luke, 619 F.2d 418 (5th Cir. 1980) (set-off right under 33 U.S.C. Sec. 933(f) is wholly independent of any right to subrogation). Accord Petroleum Helicopters, Inc. v. Collier, 784 F.2d 644 (5th Cir. 1986). It is therefore

ORDERED and ADJUDGED, by the Court, that the order from which this appeal has been taken be affirmed. It is

FURTHER ORDERED, by the Court, sua sponte, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. R.15 (August 1, 1987). This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam
For The Court
George A. Fisher
Clerk

APPENDIX
APPENDIX B

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMPENSATION PROGRAMS

JACQUE INSCOE
Claimant

COMPENSATION ORDER

ACTION CORPORATION
Employer

LUMBERMEN'S MUTUAL CAS. CO.
Insurance Carrier

APPROVAL OF AGREED SETTLEMENT-
Section 8(i)(A)

Case No. 138796

Pursuant to agreement and stipulation by and between the interested parties, and such further investigation in the above entitled claim having been made as is considered necessary, and no hearing having been applied for by any party in interest, or considered necessary by the Deputy Commissioner the Deputy Commissioner makes the following:

FIINDINGS OF FACT

1. On June 25, 1979, the claimant herein, while employed by the employer herein, sustained an injury to his back.

2. The liability of the employer for compensation under the act was insured by Lumbermen's Mutual Casualty Co.

3. The claimant was provided with medical treatment and was paid compensation for temporary total disability voluntarily by the employer and carrier from June 26, 1979 to date.

4. The parties have agreed on the pertinent issues and desire to settle the claim on the following basis: An additional lump sum of $100,000 and future medical treatment for any condition that is causally related to the injury of June 25, 1979.

5. The Deputy Commissioner, pursuant to the authority vested in her in section 8(i)(A) of the Longshoremen's and Harbor Workers' Compensation Act, as amended, finds that it is in the best interest of the employee, approves the agreed settlement, and effects a final disposition of his claim, discharging the liability of the employer and insurance carrier for such compensation, except for medical treatment.

6. An attorney's fee in the amount of $10,000 is hereby approved in favor of Allan P. Feigelson, Esquire. This fee is payable out of compensation due the claimant.

ORDER

It is ORDERED that the employer and insurance carrier shall pay forthwith all amounts due in accord with the settlement agreement, and file Form 1.S-208 showing

timely payment of the settlement amount.

Given under my hand and filed at Washington, D.C. this 29th day of June, 1981.

JANICE V. BRYANT
Deputy Commissioner
40th Compensation District

APPENDIX
APPENDIX C

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

JACQUES RONALD INSCOE :
Plaintiff :

vs. : Law No.79249

JEFFREY LEE HALLUMS :
and :
MAX GREENWALD & SONS, INC. :
Defendants :

APPLICATION TO INTERVENE

Lumbermens Mutual Casualty Company, by its attorney, Arthur V. King, respectfully request that it be allowed to intervene as a party to the Plaintiff in the captioned case and for reasons says:

1. The Plaintiff was in the course of his employment at the time that the accident complained of occurred.

2. That at said time, Lumbermens Mutual Casualty Co. was the Workmens

Compensation insurance carrier of the employer.

3. That as a result of the injuries incurred by the Plaintiff, Lumbermens Mutual Casualty Company was obligated to pay to the Plaintiff, or on his behalf, all benefits required by law.

4. To the extent of the payments which it has made, Lumbermens Mutual Casualty Company is subrogated.

WHEREFORE, Lumbermens Mutual Casualty Company respectfully requests that it be allowed to intervene as a party Plaintiff in this pending action.

Arthur V. King
Attorney for Insurer-Carrier
22 West Jefferson Street
Rockville, Maryland 20850
(301) 762-1330

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

JACQUES RONALD INSCOE :
Plaintiff :

vs. : Law No.79249

JEFFREY LEE HALLUMS :
and
MAX GREENWALD & SONS, INC. :
Defendants :

Filed
Aug 31 1981
Clerk of the
Circuit Court
for Prince
George's
County, Md.

ORDER

Upon consideration of the foregoing Motion to Intervene, it is this 28 day of August, 1981;

ORDERED that Lumbermens Mutual Casualty Company be, and hereby is, allowed to intervene as a party Plaintiff in this pending action.

JUDGE, Circuit Court for
Prince George's County,
Maryland

APPENDIX
APPENDIX D

33 USCS

Section 933. Compensation for injuries where third persons are liable

(b) Acceptance of compensation acting as assignment

Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner of Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

(f) Institution of proceedings by person entitled to compensation

If the person entitled to compensation institutes proceedings within the period

prescribed in section 33(b) [subsec.(b) of this section] the employer shall be required to pay as compensation under this Act, a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

(g) Compromise obtained by person entitled to compensation

If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this act, the employer shall be liable for compensation as determined in subdivision (g) only if the written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled

to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made.*

*This statute has been revised since the time of the proceedings below.

APPENDIX
APPENDIX E
U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of

JACQUE RONALD INSCOE
Claimant

v.

ACTON CORPORATION
Employer

and

LUMBERMEN'S MUTUAL CASUALTY COMPANY
Party In Interest

Case No.
83-DCWC-507

OWCP No. 138796

Allan P. Feigelson, Esquire
For the Claimant

Arthur V. King,
For the Employer

Before: NICODEMO DEGREGORIO
Administrative Law Judge

DECISION AND ORDER

This case arises under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. sec. 901 et seq., as extended by the District

of Columbia Workmen's Compensation Act, 36 D.C.Code 501 (1973) (the Act). Jacque Ronald Inscoe (Claimant) seeks payment of his outstanding medical expenses arising out of a work related accident on June 25, 1979.

A hearing was held on September 30, 1983 in Washington, D.C. at which the Claimant appeared with counsel and the Employer and Carrier appeared by counsel.

The parties have reached the following stipulations: (1) they are subject to the Act; (2) they were in an employee/employer relationship at the time of the injury; (3) the Claimant was timely in giving notice of the injury to the Employer and in filing the claim; (4) Claimant's average weekly wage was $276.14 at the time of injury; (5) a

work-related accident occurred on June 25, 1979; (6) On June 29, 1981 Claimant entered into a section 8(i)(A) settlement with the carrier for the lump sum of $100,000 incorporated in a compensation order by Deputy Commissioner, Janice V. Bryant; (7) Claimant filed a third party suit, in the Circuit Court for Prince Georges County in Maryland where the carrier intervened to protect his compensation lien of $148,464.88; (8) on July 2, 1982, Claimant settled his third party case for $100,00 at which time his case was dismissed with prejudice; and (9) on July 22, 1982, carrier settled its claim against the third party for $125,000.

The only contested issue is whether the Respondents are entitled to a set-off for future medical benefits against the

third party recovery obtained by Claimant.

Findings of Fact

and Conclusions of Law

I

On June 25, 1979 while working for the Employer Claimant was injured in an automobile accident. Claimant initiated a lawsuit against the third party who was responsible for the accident. While this case was pending, Claimant and Respondents entered into a settlement agreement whereby the Respondents agreed to pay Claimant $100,000 and to pay the cost of future medical treatment causally related to the June 25, 1979 injury. This agreement was incorporated into a compensation order by Deputy Commissioner Janice V. Bryant dated June 29, 1981. (Jt. Ex. 2). On August 28, 1981, the Circuit court for Prince George's County

in Maryland granted the Carrier's Motion to Intervene in the lawsuit between the Claimant and the third party. (Jt. Ex. 6,7). On July 14, 1982 before proceeding to trial Claimant and the third party entered into a settlement agreement whereby Claimant received the sum of $100,000 and discharged the third party of all liability for the June 25, 1979 accident. The Respondents also settled with the third party and received the sum of $125,000. Respondents claim that they have paid Claimant a total of $148,000 including the lump sum settlement of $100,000 and $48,000 in medical expenses. Claimant has incurred additional medical expenses since the settlement with the Respondents.

II

Claimant argues that the Respondents are liable for the payment of his

outstanding medical expenses pursuant to their settlement agreement which was incorporated into a compensation award by Deputy Commissioner Janice V. Bryant.

Employer argues that Claimant's net recovery from the third party is available as a credit against Employer's liability for future medical benefits. I agree.

III

Section 33 of the Act generally addresses the situation where an employee sustains a work-related injury because of the negligence of a third party. The intent behind sec. 33 is to foreclose the possibility of a double recovery for the claimant who files a suit against both the employer and the third party.

Section 33 (f) provides that:

> If the person entitled to compensation institutes proceedings within the period

> prescribed in section 33(b), the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

The Benefits Review Board has interpreted Sec 33(f) to entitle the employer to credit third party recovery against its liability for compensation payments under the Act and also for past and future Sec 7 medical benefits payable to the employee. Ruby v. Dresser Offshore Service, Inc., 8 BRB 432 (1978); Webb v. Santa Fe Drilling Co., 2 BRBS 367 (1975). It is only Claimant's net recovery against the third party (after attorney fees and expenses) which may be offset.

In this case Claimant was timely in initiating a suit against the third party. He received $100,000 from both

the third party and the Employer. Now he is requesting further payment for his medical expenses related to his work injury incurred after these settlements Employer is required to pay further medical benefits only after Claimant has exhausted his net recovery against the third party. Otherwise, Claimant would get a double recovery.

Further I have noted Claimant's reliance on the parties' joint petition for approval of settlement, dated May 29, 1981, as giving rise to an absolute contractual duty to pay future medical benefits. I believe Claimant is mistaken in this interpretation of that document. Paragraphs 10 and 11 of the joint petition only state the legal effect of a section 8(i)(A) settlement; they do not waive subrogation rights, or even refer to the subject.

ORDER

The claim of Jacque Ronald Inscoe for medical benefits under the Act is DENIED.

NICODEMO DEGREGORIO
Administative Law Judge

Dated: Nov 14 1983
Washington, D.C.

NND:pas

U.S. DEPARTMENT OF LABOR
Benefits Review Board
1111 20th St., N.W.
Washington, D.C. 20036

BRB No. 83-2876

JACQUE RONALD INSCOE
Claimant-Petitioner

v.

ACTON CORPORATION

and

LUMBERMEN'S MUTUAL CASUALTY COMPANY
Employer/Carrier
Respondetns

PUBLISHED
FILED AS PART OF THE RECORD
SEP 29 1986
(date)

Linda M. Meekins
cac

DECISION AND ORDER

Appeal of the Decision and Order of

Nicodemo DeGregorio, Administrative Law Judge, United States Department of Labor.

Allan P. Feigelson, Riverdale, Maryland, for the claimant.

Arthur V. King, Rockville, Maryland, for the employer/carrier.

Before: SMITH and BROWN, Administrative Appeals Judges, and MARCELLINO, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order (83-DCWC-507) of Administrative Law Judge Nicodemo DeGregorio issued pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. Sec. 901 et seq. (the Act.)

Claimant was injured in a work-related automobile accident. He settled his workers' compensation claim with employer for a "lump sum of $100,000 and future medical treatment for any condition that is related" to the

accident. Claimant also sued the other driver involved in the automobile accident in state court and employer/carrier was permitted to intervene in that suit as a party-plaintiff. Claimant eventually settled his third party claim for $100,000. Employer settled its claim for $125,000.

Claimant has since incurred additional medical expenses related to the accident. Employer does not deny underlying liability for these expenses but argues that it is entitled to a credit against claimant's third party settlement in the amount of claimant's net recovery pursuant to Section 33(f) of the Act. 33 U.S.C. Sec. 933(f). The administrative law judge agreed that employer was entitled to a credit, and he found that employer need not start paying

medical benefits again until claimant's medical expenses exceed his net recovery on the third party action. Claimant appeals.

Claimant argues employer waived its right to the Section 33 compensation lien when it settled with claimant and is bound to pay claimant's medical expenses irrespective of claimant's third party recovery. Claimant also contends such a lien fails to serve the equitable purposes of the Act. Finally, claimant aruges that the Section 33(f) compensation lien applies only to employer's compensation liability, not to its liability for medical expenses.

The Board's scope of review is limited by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence and contains no

reversible error. 33 U.S.C. Sec. 921(b)(3); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Under Section 33(f) of the Act, 33 U.S.C. Sec 933(f), where claimant's net recovery against a third party is less than employer's workers' compensation liability, employer shall be required to pay only an amount equal to the difference between the net recovery against the third party and the compensation award. Similarly, where claimant's net third party recovery equals or exceeds employer's compensation liability, it is well-established that employer is entitled to offset past and future compensation and medical payments against claimant's net third party

recovery. See Carter v. Director, OWCP, 751 F.2d 1398, 17 BRBS 18(CRT) (D.C. Cir. 1985); Ruby v. Dresser Offshore Services, Inc., 8 BRBS 432 (1978); Mitchell v. Lake Charles Stevedores, Inc., 5 BRBS 777 (1977); Webb v. Sante Fe Drilling Co., 2 BRBS 367 (1975).

In the instant case, the administrative law judge correctly held, however, that employer is entitled to offset the amount of claimant's net third party recovery and need not resume paying claimant's future medical expenses until those expenses exceed claimant's net third party recovery. The Board has explicitly rejected the argument that the Section 33(f) offset does not apply to medical benefits. Ruby, supra; Webb, supra. See 33 U.S.C. Sec. 907(h). Moreover, employer's settlement of claimant's compensation claim cannot be

construed as a waiver of its right to an offset. Contrary to claimant's argument, such an offset is not contrary to the equitable purposes of the Act. Section 33(f) has been construed in such a manner as to avoid double recovery to the claimant. See Carter, supra. Employer in this case, therefore, must pay additional medical expenses only after the net proceeds of the third party action have been offset.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

FRANK J. MARCELLINO
Administrative Law Judge

Dated this 29th day of
September 1986

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C.A. Sec. 921(b)(5) (West 1986).

1 The administrative law judge found that employer had paid $100,000 in compensation under the settlement and $48,000 in medical expenses. Under Section 33(e), employer was thus entitled to the full $125,000 it obtained in the third party action. Moreover, it is entitled to offset the excess against claimant's net recovery under Section 33(f).

APPENDIX
APPENDIX F

Law Offices
Allan P. Feigelson
(301) 864-2200

5304 Kenilworth Avenue
P.O. Box 361
Riverdale, Maryland 20840

Practicing in
Maryland and the
District of Columbia

May 29, 1981

The Honorable Janice Bryant
Deputy Commissioner
Office of Workmen's Compensation
Programs
1111 20th Street, N.W.
Washington, D.C.

RE: Jacque Inscoe vs. Acton Corporation

D/A: 6-25-79

OWCP File No. 138796

Dear Commissioner Bryant:

This is a joint petition by the parties in the above captioned matter for approval of an agreed settlement, pursuant to Section 8(i)A of the Longshoremen's and Harbor Workers'

Compensation Act and implementation regulation 702.241. In support of this application, the parties rely on the following facts:

1. On June 25, 1979, the claimant suffered an injury to his back when the company vehicle he was driving was rearended in a traffic accident while in the course of his employment as a route salesman for Acton corporation/ Mann's Potato Chips.

2. At the time of the injury, the employer was insured by Lumbermens Mutual Casualty Company.

3. The claimant's average weekly wage at the time of his injury was $276.14.

4. The employer and insurer provided the claimant with medical treatment and voluntarily paid compensation to the claimant for

temporary total disability from June 26, 1979, through the present and continuing at the rate of $184.09 per week. For the period the claimant has received medical care from Dr. Arun R. Ginde in the form of therapy, traction, and finally two surgical procedures. All medical attention received by the claimant in this regard was paid by the compensation carrier.

5. As a result of the injury to the claimant's back, the claimant has endured two major surgical interventions and is now totally and permanently disabled.

6. The claimant is not working and has not worked since the accident.

7. The claimant, in addition to his physical disability, is suffering financial hardship and he is in dire need of funds at this time.

8. The employer and insurer have

agreed to pay, and the claimant has agreed to accept, a lump sum in the amount of $100,000.00 in settlement of this case. The said amount is in addition to the amounts previously paid by the carrier for disability.

9. The parties believe that this said agreed settlement is being made in the best interest of the claimant.

10. The parties further agree that said settlement is being made without prejudice to the claimant's rights to continue to receive medical treatment for any condition which is causally related to the claimant's injury of June 25, 1979.

11. The claimant has been fully advised of his rights under the Act and is fully aware that the approval of the said agreed settlement by the Deputy Commissioner will discharge the employer

and insurer from any further liability in this matter with the exception of the medical services referred to in paragraph ten.

12. The law firm of Allan P. Feigelson has represented the claimant continuously since June of 1979, and has counseled with him on the average of five times per week with regard to his case. In addition, counsel has regularly reviewed his file and has negotiated this settlement on behalf of the claimant. Accordingly, the law firm of Allan P. Feigelson is requesting approval of an attorney's fee in the amount of 20% of the settlement, $20,000.00. The amount of the fee has been discussed with the claimant and he understands that it is to be deducted from the amount of the settlement and has agreed that the fee is fair and reasonable.

Respectfully submitted,

Allan P. Feigelson

Jacque Inscoe, Claimant

Employer/Insurer

87-1192

IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1987

JACQUE RONALD INSCOE,

Petitioner,

vs.

ACTON CORPORATION, ET AL., AND,
DIRECTOR, OFFICE OF WORKER'S
COMPENSATION PROGRAMS, U.S. DEPARTMENT
OF LABOR,

Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Arthur V. King
22 W. Jefferson Street
Rockville, Maryland 20850
(301) 762-1355
Attorney for Respondent
Acton Corporation

TABLE OF CONTENTS

NOTE: The opinions of the proceedings below:

1. United States Court of Appeals for the District of Columbia

2. U.S. Department of Labor Benefits Review Board

3. U.S. Department of Labor Office of Administrative Law Judges

4. U.S. Department of Labor Office of Worker's Compensation Programs

are printed in full in the Petitioner's brief.

STATUTES

1. The applicable federal statute, Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. Sections 933(b), (f) and (g) provide:

33 USCS
Section 933. Compensation for injuries where third persons are liable

(b) Acceptance of compensation acting as assignment
Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner of Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

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required to pay as compensation under this Act, a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

(g) Compromise obtained by person entitled to compensation
If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this act, the employer shall be liable for compensation as determined in subdivision (g) only if the written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made.*

*This statute has been revised since the time of the proceedings below.

CASES CITED

AUTHORITIES

QUESTIONS PRESENTED BY THE PETITIONER

I. Whether Section 33(f) and (g) of the Longshoremen's and Harbor Workers' Compensation Act has priority over a valid and binding settlement order of the U.S. Department of Labor.

II. Whether a set-off right is waivable under the Longshoremen's and Harbor Workers' Compensation Act.

The Respondent suggests that the sole question is whether 33(f) and 33(g) permit a double recovery by a claimant under the Longshoremen's and Harbor Workers' Compensation Act.

STATEMENT OF CASE

This petition is brought by the claimant, who was injured on June 25, 1979, in a work-related automobile accident. In May 1981, Petitioner settled his workers' compensation claim with the employer, Acton Corporation, for a lump sum of $100,000.00 with the express approval of the Deputy Commissioner of the Office of Worker's Compensation Programs pursuant to Section 8(i)(A) of the Longshoremen's and Harbor Workers' Act.

Subsequently, the petitioner settled his third party case for an additional $100,000.00 and thereafter the employer compromised its lien of $148,000.00 for $125,000.00.

The petitioner alleges that he continues to incur medical expenses which the respondent declines to pay,

relying on 33 U.S.C. section 933(f) which allows the employer credit or a set-off until such time as the claimant uses up his net third party recovery.

ARGUMENT

This issue can hardly be considered a case of first impression. Section 33(f) of the Longshoremen's and Harbor Workers' Compensation Act has repeatedly been interpretated by the various jurisdictions on various levels to allow the employer to off set or take credit for the claimant's net recovery from a third party. Only after the claimant's net recovery is used up is the employer obligated to pay further benefits.

The United States Court of Appeals for the District of Columbia Circuit (a per curiam unreported case) cited "the clear and convincing reasoning of our sister court," Petro-Weld, Inc. v. Luke, 619 F.2d 418 (5th Cir. 1980), and also Petroleum Helicopters, Inc. v. Collier, 784 F.2d 644 (5th Cir. 1986). Additionally, the Benefits Review Board

has addressed this issue on a number of occasions, including Ruby v. Dresser Offshore Service, Inc., 8 BRB 432 (1978), among others.

Larson, in his treatise on Workmen's Compensation, states:

> [T]he claimant should not be allowed to keep the entire amount both of his compensation award and of his common-law damage recovery. The obvious disposition of the matter is to give the employer so much of the negligence recovery as is necessary to reimburse him for his compensation outlay, and to give the employee the excess. This is fair to every one concerned: the employer, who, in a fault sense, is neutral, comes out even; the third person pays exactly the damages he would normally pay, which is correct, since to reduce his burden because of the relation between the employer and the employee would be a windfall to him which he has done nothing to deserve; and the employee gets a fuller reimbursement for actual damages sustained than is possible under the compensation system alone. 2 A. Larson, the Law of Workmen's Compensation, §71.20 (1975).

Although the above appears to be directed primarily to subrogation (not the issue in this case), the underlying principle appears the same: to avoid a double recovery or windfall by a claimant.

The State of Maryland has a similar provision in its Workmen's Compensation Code (Article 101, Section 58, Annotated Code of Maryland), captioned "When Third Party Liable," and has case law stating:

> [2] The rule is that when a recovery is made by an injured employee from a negligent third party pursuant to §58, the proceeds are to be distributed as of the time of settlement [or payment of judgment], and future payments by the employer and insurer are suspended until such time, if it occurs, that the net amount received by the injured employee from the negligent third party is exceeded by the benefits

to which the injured employee would have been entitled in the absence of third party liability. At that point in time, the employer and its insurer shall recommence the payment of all benefits provided for in Art. 101. Brocker Manufacturing and Supply Company, Inc. v. Mashburn, 17 Md. App. 327, 301 A.2d 501 (1973).

CONCLUSION

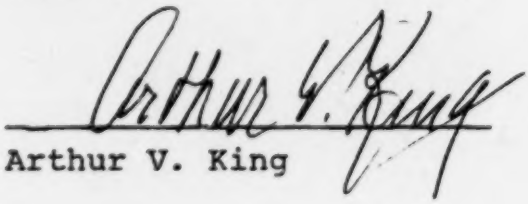
For the reasons stated above, and to be fair to every one concerned (as Larson stated), it is requested that this Honorable Court deny the claimant's Petition for a Writ of Certiorari.

Respectfully submitted,

Arthur V. King
Attorney for Respondent
22 W. Jefferson Street
Rockville, Maryland 20850
(301) 762-1355

PROOF OF SERVICE

I HEREBY CERTIFY that on this _____ day of February, 1988, I mailed three copies of the foregoing to Allan P. Feigelson, 5304 Kenilworth Avenue, P.O. Box 361, Riverdale, Maryland 20737, and Director, Office of Worker's Compensation Programs, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20001.



Arthur V. King

(3)

No. 87-1192

In the Supreme Court of the United States

OCTOBER TERM, 1987

JACQUE RONALD INSCOE, PETITIONER

v.

ACTON CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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10 pp

QUESTION PRESENTED

Whether the employer's settlement of a worker's compensation claim waived the employer's right under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (1982 ed.) 933(f), to offset the claimant's recovery from the third-party tortfeasor against the employer's liability under the settlement agreement.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulation:

Statutes and regulation – Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 12-14) is reported at 830 F.2d 1188 (Table). The opinion of the Benefits Review Board (Pet. App. 33-40) is reported at 19 Ben. Rev. Bd. Serv. (MB) 97. The opinion of the administrative law judge (Pet. App. 25-33) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1987. The petition for a writ of certiorari was filed on January 19, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 25, 1979, petitioner Jacque Ronald Inscoe was injured in an automobile accident while working for respondent Acton Corporation (the employer) as a route

salesman (Pet. App. 28, 42). In May 1981, petitioner and the employer entered into a settlement of petitioner's worker's compensation and medical benefits claim against the employer under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. 901 *et seq.*, as incorporated by reference in the District of Columbia Workmen's Compensation Act (DCWCA), D.C. Code Ann. §§ 36-501 to 36-502 (1973).[1] By the terms of the settlement (Pet. App 41-46), the employer agreed to pay petitioner a lump sum of $100,000 and all future medical expenses "causally related" to the injury (*id.* at 44; see *id.* at 44-45). The settlement agreement was approved by a Deputy Commissioner of the Office of Workers' Compensation Programs, United States Department of

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[1] The District of Columbia has since enacted a new workers' compensation law, D.C. Code Ann. §§ 36-301 *et seq.* (1981 & Supp. 1987), pursuant to "home rule" authority granted to the District by the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, § 102, 87 Stat. 777. The new law became effective on July 26, 1982, for injuries occurring after the effective date; employers continue to be liable under the earlier DCWCA for injuries that occurred prior to that date. See 20 C.F.R. 701.101(b).

The LHWCA was amended in 1984 by the Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639, and was retitled the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. III) 901 *et seq.* The provisions of the unamended version of the LHWCA continue to apply to claims arising out of injuries that occurred before the effective date of the 1982 District of Columbia law cited above. *Keener* v. *WMATA*, 800 F.2d 1173, 1175 (D.C. Cir. 1986), cert. denied, No. 86-1181 (Mar. 9, 1987).

We will refer here to the pre-amendment Longshoremen's and Harbor Workers' Compensation Act. If a specific section of that Act has been changed by the 1984 Amendments, however, we will so indicate by including in the citation the year of the edition to which we refer, *e.g.*, 33 U.S.C. (1982 ed.) 908(i)(A).

Labor, pursuant to Section 8(i)(A) of the LHWCA, 33 U.S.C. (1982 ed.) 908(i)(A) (Pet. App. 15-18).[2]

Prior to that settlement, in January 1980, petitioner had brought suit in state court against the third-party tortfeasor (Pet. App. 28). The employer intervened in that action to recover the amount paid by it under the worker's compensation settlement (*id.* at 29).[3] On July 14, 1982, petitioner and the employer settled their claims against the third-party tortfeasor for $100,000 and $125,000, respectively (*id.* at 27-29).

2. Subsequently, petitioner sought payment of additional medical expenses from his employer (Pet. App. 25-26, 29-30). The employer refused to pay on the ground that petitioner's total worker's compensation claims exceed the $100,000 the petitioner had recovered from the third party, and to the extent of that excess it was entitled, under Section 33(f) of the LHWCA, 33 U.S.C. (1982 ed.) 933(f),[4] to look to petitioner's $100,000 recovery from the third party for payment of those expenses (Pet. App. 27-28).

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[2] Section 8(i)(A) of the LHWCA, 33 U.S.C. (1982 ed.) 908(i)(A), provides, in pertinent part:

> Whenever the deputy commissioner determines that it is for the best interests of an injured employee entitled to compensation, he may approve agreed settlements of the interested parties, discharging the liability of the employer for such compensation * * *.

[3] Intervention was undertaken in August 1981 by the employer's subrogee insurance carrier, Lumbermens Mutual Casualty Company, to assert its claim for reimbursement of amounts paid by the employer (Pet. App. 19-21). See 33 U.S.C. 933(h).

[4] Section 33(f) of the LHWCA, 33 U.S.C. (1982 ed.) 933(f), provides:

> If the person entitled to compensation institutes proceedings within the period prescribed in subsection (b) of this section the

3. After a hearing, an administrative law judge (ALJ) concluded that the employer was required to pay petitioner's medical expenses only to the extent that they exceeded recovery by the claimant against the third-party tortfeasor (Pet. App. 30-32).[5] The ALJ reasoned that a contrary decision would result in a double recovery for the petitioner (*ibid.*). The ALJ expressly rejected petitioner's argument that the employer waived its Section 33(f) set-off rights by the terms of the settlement (Pet. App. 32).

The Benefit Review Board affirmed (Pet. App. 33-40). It concluded that the settlement could not be construed as a waiver of the employer's right to a credit; that the Section 33(f) set-off applies to medical benefits; and that the set-off served the equitable purposes of the Act by preventing a double recovery (Pet. App. 38-39).

The court of appeals summarily affirmed in a per curiam judgment order (Pet. App. 12-14). It agreed with the Board that "the employer had taken no action that constituted a waiver of its set-off right" (*id.* at 13).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. The petition raises only a factbound question regarding the construction of the worker's compensation settlement agreement. Review by this Court is therefore not warranted.

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employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

[5] The administrative law judge made clear that it "is only Claimant's net recovery against the third party (after attorney fees and expenses) which may be offset" (Pet. App. 31).

It is well settled that, in order to avoid a claimant's double recovery, an employer has a statutory right, pursuant to Section 33(f) of the LHWCA, 33 U.S.C. (1982 ed.) 933(f), to offset a claimant's recovery from a third party against its own liability for unpaid benefits under the LHWCA. *Petroleum Helicopters, Inc.* v. *Collier*, 784 F.2d 644, 646-647 (5th Cir. 1986); *Carter* v. *Director, OWCP*, 751 F.2d 1398, 1399 (D.C. Cir. 1985); *Petro-Weld, Inc.* v. *Luke*, 619 F.2d 418, 421 (5th Cir. 1980); see also *Bloomer* v. *Liberty Mutual Ins. Co.*, 445 U.S. 74, 79, 87 (1980). Thus, absent an effective waiver of its set-off rights, petitioner's employer is obligated to pay petitioner's medical expenses only after those expenses exceed his net recovery from the third party.

Petitioner's sole contention (Pet. 7-8) is that his settlement agreement with his employer was intended to effect such a waiver. But the ALJ, the Benefits Review Board, and the court of appeals all agreed that the settlement agreement, by its terms, does not waive the employer's statutory set-off right. Petitioner has pointed to nothing in the settlement agreement or in the circumstances of its making to suggest that they erred.[6] Further review of petitioner's factbound claim is therefore not warranted.

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[6] Before the Board, petitioner argued that paragraphs 10 and 11 of the settlement agreement waived the employer's set-off right. Neither provision, however, constitutes a waiver. Paragraph 10 merely provides that the settlement does not abrogate petitioner's right to continued medical treatment, while paragraph 11 acknowledges that petitioner is fully aware that approval of the settlement discharges the employer and its insurer from further liability, except for medical expenses. In sum, there simply is no evidence that the employer relinquished its statutory right to a set-off.

Moreover, the provisions relied upon are merely a reflection of the legal effect of a compromise settlement that is approved under Section 8(i)(A), rather than one that is also approved under Section 8(i)(B), 33

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1988

U.S.C. (1982 ed.) 908(i)(B). A Section 8(i)(A) settlement discharges only the employer's liability for periodic compensation and not medical benefits, whereas a settlement approved under Section 8(i)(B) discharges the employer's liability for medical benefits as well. Therefore, as the ALJ concluded, no special importance should attach to the settlement provisions in this case. Pet. App. 32.

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